IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

H.A.S. ELECTRICAL CONTRACTORS, INC. APPELLANT

VERSUS CAUSE NO. 2015-CA-0596

HEMPHILL CONSTRUCTION COMPANY, INC. APPELLEE

APPEAL FROM THE CIRCUIT COURT OF

RANKIN COUNTY, MISSISSIPPI

REPLY BRIEF ON BEHALF OF

H.A.S. ELECTRICAL CONTRACTORS, INC., APPELLANT

ORAL ARGUMENT REQUESTED

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I.

CERTIFICATE OF INTERESTED PERSONS

This undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal.

H.A.S. ELECTRICAL CONTRACTORS, INC., the Appellant
HEMPHILL CONSTRUCTION COMPANY, INC., the Appellee
HONORABLE JOHN HUEY EMFINGER, Trial Judge
JIM DAVIS, Lawyer for the Appellant
DANNY A. DRAKE, Lawyer for Appellee
DAVID BONDS ELLIS, Lawyer for Appellee

DATED this 03rd day of November, 2015.

/s/ Jim Davis
Honorable Jim Davis
Attorney of Record for Appellant

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The Appellee summarily failed to refute the fact that the Court committed reversible error in not conducting a proper *Batson* analysis. The Appellee failed to show or provide any authority to support how it was not error when the Court found that one strike of an African American was not sufficient to show discriminatory intent or pretext for racial discrimination. Furthermore, the appellee provided no authority to contradict the appellant's authority that the appellee was ever a "prevailing party" for purposes of the award of attorney's fees. The Appellee provided no basis in the record which could support the $90,000.00 award of attorney's fees, which affirms the Appellant's argument that this number was plucked "out of the air." The Appellee failed to show how a single one of these errors is not reversible error, as each would suffice as such, and the Appellee has certainly failed to show how these errors would not cumulatively constitute reversible error.

A. THE COURT ERRED IN ITS FINDING THAT NO PRIMA FACIE CASE OF RACIAL DISCRIMINATION WAS ESTABLISHED, AND THE APPELLEE PRESENTED NO AUTHORITY OR FACTUAL BASIS TO CONTRADICT THIS CLEAR ERROR.

The lower Court in the case sub judice committed reversible error when the Court found that no prima facie case of racial discrimination had occurred. HAS clearly made a prima facie case of racial discrimination. The Court erroneously found that more than one racially motivated strike is necessary for a prima facie case. However, this finding is contrary to the law. Furthermore, the Court asked for a race neutral reason for the strike

from Hemphill, which necessary means that a prima facie case was made because a race neutral reason is only necessary if, and only if, a prima facie case is made.

The Trial Court erred when it ruled that the first strike by Hemphill was not a violation of Batson simply because there was one strike of an African American, and thus, there was no "pattern" sufficient to raise the need for a Batson analysis. The Court stated:

> THE COURT: **Well, I don't see how in the world you can have a pattern after one strike**...
>
> THE COURT: All right. Well, I believe that there's not a pattern. **That's the first person – that's the first black that's been presented. I don't believe that there's any pattern possible**. The older venire, whether there's one or two, or three, I don't believe that's a good reason so I'm going to – **I'm going to recognize the strike.**

(Transcript, at 52-53) (Emphasis added).

This was clear error because *Batson* itself states that several strikes or instances of racial discrimination are not necessary to require a *Batson* analysis: "**Moreover, 'a consistent pattern of official racial discrimination is [not] a necessary predicate to a violation of the Equal Protection Clause**.' " *McGee v. State*, 953 So. 2d 211, 215 (Miss. 2007) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 266 n. 14 (1977)). (Emphasis added).

Justice Dickenson, in his concurrence, further elaborated on this point:

> **For evidentiary requirements to dictate that '*several must suffer discrimination*' before one could object,**

> **would be inconsistent with the promise of equal protection to all**.
> *McGee* at 217-19 (Miss. 2007) (Emphasis added) (citing *United States v. Young,* 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)) (Internal citations omitted).

The Court is clear that no "pattern" must be drawn from "several" or multiple instances of discrimination for a prima facie case to arise, or for the need to make a pretextual analysis. One case of potential discrimination is enough.

The Appellee summarily failed to cite any authority which stood for the proposition that several strikes that are racially motivated is necessary to constitute a prima facie case. (Brief of Appellee at 8). The Appellee merely cites cases that say that the trial court should be afforded deference in cases involving credibility. (Brief of Appellee at 7). This is irrelevant because the issue here is not credibility. The Appellee also cites a myriad of irrelevant cases for the sole proposition that the trial court was affirmed in those cases which involved racial discrimination. Again, this is irrelevant. The issue is whether the Court erred in finding no prima facie case was established because one cannot have a pattern of discrimination from only one strike, which was a finding in contravention to mandatory authority. *Supra*. Also, in contrast to the cases cited by the Appellee, this case is also reversible because the lower Court failed to make a proper Batson analysis, and failed to follow the proper three step analysis as outlined in the Appellant's initial Appellate Brief. The Appellee also makes the erroneous argument that "all parties, attorneys, and witnesses at trial were white." (Brief of Appellee at 11). This is completely irrelevant and arbitrary. There is no requirement in the *Batson* analysis that the struck juror be the same race as the party making the *Batson* challenge, and this has no effect on the success of the challenge. *Robinson v. State*, 726 So.2d 189 (Miss. Ct. App. 1998).

The trial court clearly erred and its findings are in contravention to the clear case law on point outlined above. A prima facie case was clearly made by HAS. These errors are in clear contravention to mandatory case law from the Mississippi Supreme Court and the United States Supreme Court, who have also held that such errors are never harmless, as they deal with "fundamental rights," and necessitate reversal. Therefore, this case should be reversed.

B. THE APPELLEE PROVIDED NO MANDATORY AUTHORITY ON THE ISSUE OF WHETHER HEMPHILL CONSTITUTED A "PREVAILING PARTY", IN ORDER TO HAVE A CLAIM FOR ATTORNEYS FEES, AND THE MANDATORY AUTHORITY CITED BY THE APPELLANT CONTROLS.

The Trial Court erred when it awarded Hemphill attorney's fees as the "prevailing party" despite the fact that they do not comply with the definition in Mississippi. The Appellee erroneously states that "all" of the cases cited by the Appellant on this point are regarding the "open account statute" (M.C.A. Sect. 11-53-81), however, this is not the case. (Brief of Appellee, at 12). And, the cases cited by the Appellant on this point in its Brief are defining "prevailing party" with regard to all cases, and never do they say that their interpretation only deals with the "open account statute, as the Appellee misconstrues. (Brief of Appellee, at 12). The Appellee cites to several Fifth Circuit cases that are not directly on point, and are not mandatory authority. Even the cases the Appellee cites favor the Appellant's position. The Appellee cites *Cobb v. Miller*, 818 F.3d 1227 (5th Cit. 1987) for the proposition that a "prevailing party" is one who acquires the "primary relief sought." *Id.* at 1231. However, in that case, Cobb was awarded $12,300.00, not 0. *Id.* at 1229. Appellee's arguments are without merit.

The mandatory authority from Mississippi law, defining "prevailing party" for the purposes of awarding attorneys' fees, states:

> "Therefore, in order to qualify for attorney's fees under § 1988, a plaintiff must be a "prevailing party." **Under our "generous formulation" of the term, " 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit**...' "
>
> "Therefore, to qualify as a prevailing party... ***The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought***... Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff..."
>
> **In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.**

Cruse v. Nunley, 699 So. 2d 941, 944-45 (Miss. 1997)(internal citations omitted).

In other words, in order to be a "prevailing party," a litigant must find actual relief on the merits of his claim, which changes the relationship between the plaintiff and defendant, *i.e.* through some "benefit." Hemphill received no benefit. Hemphill received no relief. Hemphill received a jury verdict of 0. The relationship between the parties had a change of zero. This does not equate to "prevailing." Thus, attorneys' fees are not proper. Although *Cruse* was a case interpreting the U.S.C. Sect. 1988 statute, it is nonetheless on point because it defines "prevailing party." Additionally, *Miller v. R.B. Wall Oil Co., Inc.,* 970 So. 2d 127, 133 (Miss. 2007) held that a party is not a "prevailing party" eligible for the award of attorneys' fees unless it prevails on "all claims." This, too,

is right on point. Hemphill did not prevail on all claims, but was rendered a verdict of 0. They are, thus, not entitled to attorneys' fees. Although *Miller* dealt specifically with Rule 56 awards of attorneys' fees to the prevailing party, its definition is conclusive nonetheless.

Furthermore, if the Appellee prevailed with a zero verdict, so did the Appellant, because it was awarded a zero verdict too, and it should be awarded attorneys' fees as well, which would be nonsensical.

There is a problem with the argument of the Appellee logically as well, and the argument of the Appellee presents a legal fallacy. Does not the essence of "prevailing" mean that one is above or over the other: "pre"—before, "vail": to descend, or lower. *See* Oxford Dictionary.com. HAS was not "lowered" before Hemphill by the form of the verdict, and the verdict was zero for both sides, effectually a "draw." Zero itself is a numerical representation of nothingness, a void, a depravity. It has no real ontological or existential being in and of itself, and therefore cannot be a source of substance from which anything can be, or from which any*thing* can come. Because Hemphill is said to have been given zero, or nothing, by the jury, it necessarily cannot be said that any "benefit" (bene: "good") was given to it. *Cruse*. To say that Hemphill received a benefit from nothing would violate the principle of non-contradiction: A thing cannot be "nothing" and "something" (or some "good") at the same time. Thus, logically, Hemphill did not prevail, and is not entitled to attorneys' fees.

Appellee further did not respond the argument of the Appellant that it would be contrary to public policy to consider a party who receives a verdict of 0 a "prevailing party." There is no real relief granted here, and flies in the face of M.R.C.P. 12: to seek a "claim for which *relief* may be granted." There was a claim made by Hemphill, but the

jury granted no relief. Therefore, Hemphill is not a "prevailing party" under Mississippi law.

It should also be pointed out that the Appellee erroneously states that "the jury's verdict clearly found for Hemphill on H.A.S. claims and Hemphill's counterclaim…" (Brief of Appellee at 13). This is preposterous because the jury did not, in fact, find for Hemphill, especially on their counterclaim. Hemphill's logic is faulty if it equates zero to a jury verdict "finding for" them.

The Appellee further made no response to the argument of the Appellant that the subject contract was clearly unconscionable in light of in its attorney's fees provision, and also in its indemnity provision, which "deprived of all the benefits of the agreement or left without a remedy for another party's nonperformance or breach.' " The Indemnity provision in the subject contract mandates that **the Subcontractor, HAS, shall "hold the Contractor (Hemphill) harmless from …on account of any breach of any breach of them subcontract.**" (Trial Ex. 2 at 2). Aside from grammatically unsound, "them subcontract," the obvious intent of this term of the contract by the drafter, Hemphill, was to deprive Hemphill "of all the benefits of the agreement or left without a remedy for another party's nonperformance or breach.' " As previously cited in the Appellant's Brief, this is clearly unconscionable. The Appellee made no effort to respond to this argument, because, it can be inferred, that there is nothing to refute this term of the contract which also evidences the unconscionability and "take it or leave it" basis of its presentation.

C. THE APPELLEE FAILED TO SHOW ANY EVIDENTIARY BASIS IN THE RECORD THAT THE LOWER COURT CONDUCTED A PROPER REASONBLENESS ANALYSIS OF ATTORNEY'S FEES, AND THE APPELLEE FAILED TO REFUTE THE APPELLEE'S ASSERTION THAT

THE LOWER COURT'S CALCULATION OF ATTORNEY'S FEES WAS INCORRECT AND EFFECTUATED A MISCARRIAGE OF JUSTICE.

"The award must be supported by credible evidence, however, and *may not be plucked out of the air*." *Young v. Huron Smith Oil Co., Inc.*, 564 So. 2d 36, 40 (Miss. 1990) (Emphasis added). The amount of attorney's fees requested awarded to Hemphill in this case was $90,000.00. This is simply not a reasonable amount in a case where both sides were awarded $0. The lower Court made virtual "lip service" in citing the factors, but summarily failed to apply even one of the factors specifically to the case at bar. (Supplemental Transcript, at 8). The Appellee contends that the Court "analyzed the reasonableness factors," but the Court did not such thing. (Brief of Appellee, at 14). This is reversible error, because the analysis of reasonableness was never even done by the Lower Court. ***The Appellee presented nothing in their Brief as to how the Court calculated $90,000 as the number of attorneys' fees were owed.*** There is no calculation, accounting, or any mathematical premise whatsoever that points to how the Court got to this number. The lower Court's granting of attorneys' fees should be reversed.

The Court cannot simply make lip service to reasonableness factors in making such a large award of attorneys' fees. This is another violation of public policy. Certain factors must be met, and reference should have been made to the *McKee* factors, and correlated to the facts in the case to make an evidentiary basis for the calculation of the award, and, the reasonableness of that amount, as the Supreme Court has held: "Clearly, the trial judge abused her discretion in awarding this extreme amount of attorneys' fees. ***The McKee factors should have been applied by the trial judge in determining the amount of attorneys' fees to be awarded, and any award should be***

supported with factual determinations. The award of attorneys' fees should be vacated and remanded to the trial court." *Mississippi Power & Light Co. v. Cook*, 832 So.2d 474 (Miss. 2002)(emphasis added).

It is abundantly clear that the lower Court failed to show any calculation of how it came up with $90,000.00. It appears from the record that the lower Court just pulled the number "out of its hat." The Court stated, "I find that – the fees to be reasonable under the circumstances based upon the nature and services provided… and I'm going to award attorneys' fees in the amount of $90,000.00 to Hemphill Construction." This is preposterous for a $90,000.00 attorney's fee award to be given with no basis, analysis, or calculation in the record whatsoever. The Appellee made no meaningful attempt to show a factual basis for the Court's findings on the award of attorneys' fees, mainly because there were none. This clear error committed by the Court has equated to a miscarriage of justice, and a deprivation of due process to HAS.

IX.

CONCLUSION

The Appellee summarily failed to refute the fact that the Court committed reversible error in not conducting a proper *Batson* analysis. The Appellee failed to show or provide any authority to support how it was not error when the Court found that one strike of an African American was not sufficient to show discriminatory intent or pretext for racial discrimination. This case should be reversed to preserve the equal protection of our laws and the integrity of the justice system. Furthermore, the appellee provided no authority to contradict the appellant's authority that the appellee was ever a "prevailing party" for purposes of the award of attorney's fees. The Appellee provided no basis in the record which could support the $90,000.00 award of attorney's fees, which affirms the

Appellant's argument that this number was plucked "out of the air." The Appellee failed to show how a single one of these errors is not reversible error, as each would suffice as such, and the Appellee has certainly failed to show how these errors would not cumulatively constitute reversible error.

DATED this 03rd day of November, 2015.

RESPECTFULLY SUBMITTED,

H.A.S. ELECTRICAL CONTRACTORS, INC.,
Appellant/Defendant

By: ***/s/ Jim Davis***
JIM DAVIS

X.

CERTIFICATE OF SERVICE

I, JIM DAVIS, attorney for the Appellant, do hereby certify that I have this day served a true and correct copy of the above and foregoing Appellant's Opening Brief by first class United States mail, postage prepaid, on the following:

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HONORABLE JOHN H. EMFINGER
CIRCUIT COURT JUDGE
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DATED this the 03rd day of November, 2015.

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